UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA
BEFORE THE HONORABLE ROBERT C. JONES, DISTRICT JUDGE
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IN RE: ASSET RESOLUTION.	No. BK-S-09-32824
IN RE: USA COMMERCIAL MORTGAGE.	No. 2:07-CV-892-RCJ-GWF
	May 17, 2010
	Reno, Nevada

TRANSCRIPT OF MOTION HEARING

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COMPUTER-ASSISTED TRANSCRIPTION

RENO, NEVADA, MONDAY, MAY 17, 2010, 9:00 A.M.

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THE COURT: We're here in a district court proceeding, not bankruptcy proceeding, of Asset Resolution/ USA Commercial, and this is, of course, the previously adversary proceeding in bankruptcy court but now withdrawn and also originally filed here district court cases.

I acknowledge in the courtroom Judge Hagen in whose seat I sit and position I sit. We're so grateful for you, Judge Hagen, for being here as a potential mediator and arbitrator in this very complex case.

Let's start, please, with appearances, if we could, please, in Reno first.

MR. MAJORIE: In Reno. I'm sorry.

THE COURT: Right.

Good morning, your Honor. Francis B. Majorie, and with me is Ms. Ells on behalf of Silar.

MR. HAYWARD: Good morning, your Honor. Daniel Hayward on behalf of the Compass entities, Mr. Piskun and Mr. Blatt.

THE COURT: Thank you so much.

MR. HAYWARD: Thank you.

MS. CHUBB: Good morning, your Honor. Janet Chubb, Michael Collins, Rob Millimet and McAlan Duncan for the

plaintiffs.

MR. MILLIMET: Good morning.

THE COURT: Thank you.

MR. DABBIERI: Good morning, your Honor. Jonathan Dabbieri on behalf of William Leonard, the Chapter 7 trustee for Asset Resolution.

THE COURT: Thank you.

And in Las Vegas, please.

MR. VILAPLANA: Good morning, your Honor. Victor Vilaplana of Foley & Lardner on behalf of Pathfinder Pompano.

I'm appearing on the matter that is continued over from last Thursday, your Honor.

THE COURT: We'll probably take that up first. Thank you so much.

MS. STEPHENS: Good morning, your Honor. Elizabeth Stephens appearing for the trustee, William Leonard of the Asset Resolution estate.

THE COURT: Thank you, Ms. Stephens.

MR. LEONARD: Good morning, your Honor, Biff Leonard, Trustee.

THE COURT: Thank you, Mr. Leonard.

MR. MacROBBIE: Good morning, your Honor. James MacRobbie of Silvester & Polednak on behalf of Sullivan & Worcester, also on the matter that was continued from last

week's hearing.

THE COURT: Thank you.

Any other appearances.

Let's take up the bankruptcy matter in the bankruptcy case withdrawn which was the matter that was continued over to today.

This was, just for the record -- let's see. Do I have a motion number? Here it is, BK-S-09-32824. This was docket number 732, motion for an order approving asset management and majority, Pompano Bay as asset manager.

Again, please, that was continued over so that -- let's see. Ms. Rasmussen is not here?

MR. VILAPLANA: She's not here in Las Vegas, your Honor, that's correct.

THE COURT: It was continued over so that she could raise any concerns. Has she raised any concerns and did we have any further objections?

MR. VILAPLANA: I have received no further word from Ms. Rasmussen, and we've had no further objections, your Honor.

THE COURT: Okay. So you represented last time you had more than 51 percent vote, correct?

MR. VILAPLANA: I did, your Honor.

THE COURT: And you still do.

MR. VILAPLANA: Yes, your Honor.

THE COURT: Okay. Then it's appropriate to approve that order.

And just for the record, too, so -- I'll have to repeat this each time. This was to authorize the assumption of servicing rights by the designated servicer of the 51 percent in that particular note.

This isn't a termination of Asset Resolution's servicing rights, nor Mr. Leonard's authority thereto. We already terminated those servicing rights and gave Mr. Leonard the ability for a temporary period to continue to service while those rights were under consideration by the note holders.

So what you're doing is simply assuming, with the Court's approval and consent, the servicing rights on behalf of the 51 percent.

MR. VILAPLANA: That is correct, your Honor.

Just for the record and to make sure that your Honor is aware of all the important facts in this matter, as a result of our efforts to reaffirm -- to seek reaffirmation of the votes as you suggested last Thursday, we did contact a number of the -- but not all of the direct lenders that had voted for Pathfinder.

In that process, several -- two of the direct lenders asked that we make changes to the proposed agreement. One of those people that made this request was Ms. Chubb's

client.

We agreed to those changes. They are for the benefit of all the direct lenders so we're glad to make them, and we will make them, your Honor.

MS. CHUBB: Thank you. I just wanted to clarify the record that we had made some changes. Thank you.

THE COURT: Okay. Very good. If you'll submit those orders, please, after passing them by counsel.

MR. VILAPLANA: By counsel you mean Ms. Chubb and trustee's counsel?

THE COURT: Yes. Anybody else want a copy of that order?

Yes, please.

MR. MacROBBIE: Your Honor, James MacRobbie on behalf of Sullivan & Worcester.

We had previously filed a reservation of rights in response to this motion and have agreed with counsel for the moving party on additional language to be inserted.

I would just like a chance to review the final order.

THE COURT: Yes, please.

MR. VILAPLANA: And that is correct, your Honor, we will be glad to do that.

THE COURT: Thank you so much.

MR. VILAPLANA: Thank you, your Honor.

THE COURT: Anything else, then, before we proceed to case 892 and the summary judgment motions?

All right --

MS. CHUBB: Your Honor?

THE COURT: Please, Ms. Chubb, preliminary?

THE CLERK: Excuse me, Pamela Hallaman has joined the conference.

THE COURT: Thank you much. This is Judge Jones. We're in process.

MR. HALLAMAN: Thank you, your Honor, and I hope not to disturb the Court.

THE COURT: Thank you.

MS. CHUBB: Good morning, your Honor.

With respect to the Huntsville sale, it turned out after we started to close that three of the parcels had never been foreclosed on by any of the servicers --

THE COURT: There you go.

MS. CHUBB: -- even though they're part of the sale order.

So Mr. Dabbieri and I submitted an amended order which expands the sale order to allow the new buyers to have the right to foreclose on those properties. So I just wanted to bring that to your attention.

THE COURT: So, in essence, are we selling the note then? In other words, do we still have responsibility

and liability for completing the foreclosure, for getting trustee's guarantee?

MS. CHUBB: No. My clients did not ask for recision. They will undertake the job of foreclosing on the three parcels.

THE COURT: Okay. So 892 and any of the entities thereto, Asset Resolution in particular, have no further obligation.

MS. CHUBB: Correct.

THE COURT: You're taking the note and all responsibility for the note.

MS. CHUBB: Yes. We would like to get the note --

THE COURT: You bet.

MS. CHUBB: -- since we're going to need it.

THE COURT: Absolutely.

MS. CHUBB: So maybe somebody could see about that.

THE COURT: Yes, please, if you'll see about it.

MS. CHUBB: I will.

THE COURT: And I'll give you any order that you need.

MS. CHUBB: Okay. Fine. Thank you.

THE COURT: Thank you so much.

Now, a little bit of background, then, to 892.

Are we ready to proceed with the summary judgment arguments? Is everybody in accord with doing that?

We do have, of course, Judge Hagen who I understand is standing by potentially for mediation arbitration, and there's no reservations about the Court hearing these motions and ruling on them. I assume that will advance any final resolution, especially if you have a mediation in mind.

MR. COLLINS: We agree, your Honor. We think it's -- if the Court has the time today, that we should argue them.

THE COURT: Okay. So there's no reason to delay that.

MR. MAJORIE: No, your Honor, but -- and we are scheduled for mediation tomorrow in front of Judge Hagen.

THE COURT: Okay. A little background then, please.

MR. MAJORIE: I'm sorry, your Honor, with -- I may want to argue that the May 24th trial should not go forward, but that wasn't specifically what your Honor asked about so --

THE COURT: And I'll discuss that at the end of the summary judgment which I think would be the best time.

This case originates back in an old bankruptcy case, USA Commercial Mortgage, 2:07 -- I'm sorry, no, bankruptcy -- I don't even have the bankruptcy number.

Judge Riegle presided over that case. It was a complex case. Commercial Mortgage got itself into difficulty. It had over 5, 6,000 direct lender investors in the various notes that it was in the business of placing and selling interests in.

It had how many properties, finally and/or notes?

MS. CHUBB: Over 50 loans.

THE COURT: Right, 50 loans, and some of them were in the millions and tens of millions of dollars each for those loans.

Thank goodness, USA Commercial didn't get into a pyramiding scheme like we've seen before, that is, double selling interests in notes, but what it did do was something akin to it.

It had an escrow account, of course, and it would receive payments and then pass them on, but it got into the habit, in order to promote its business, of making distributions of payments it hadn't even received.

So it made regular distributions to direct lenders on their investment, their 10 percent, two percent, three percent in a loan, but oftentimes it made the distribution without any receipt of a payment on the other side.

It, of course, quickly developed a negative position in its escrow account, and to accommodate that, on the other

side of the balance sheet, there were a number of times when they received payments and payoffs, or partial payoffs, of notes which they did not distribute to direct lenders, instead, they used it to cover the shortfall in their escrow account.

So, in the bankruptcy estate, there were many, if you will, called prepaid -- what did we call it, prepaid interest?

MS. CHUBB: Prepaid interest, yes.

THE COURT: -- prepaid interest where payment had not been received but, in fact, interest payments had been paid out on the other side, many in the form, then, if you will, of fraudulent conveyance or preference, also subject to attack under Nevada law, of course, it was just contractually and fiduciarily impossible and should not have been accomplished to pay out those payments without receipt of a payment from a borrower.

The arrangement between USA Commercial and various direct lenders was one of contract. There were LSAs, lender what?

MS. CHUBB: Loan servicing agreements.

THE COURT: Loan servicing agreements, and they varied in form, but they had a very common theme and common language in many of the paragraphs, and, basically, like most loan servicing agreements, they provided that USA Commercial

was basically the lead lender, it was the lender, it was the servicing agent, it had the right to handle all of these loans and, of course, make distributions on behalf of direct lenders who were the actual owners of the notes.

It also gave it right to, in some of the cases, some of the loans, to default interest, accelerated default charges.

The concept under the LSAs was that, in essence, in many cases, it was USA Commercial that would keep default interest rates much higher than the regular rate, late charges and default amounts.

The attorneys in USA Commercial could see that there was a very big train wreck coming down the road. They not only had lots of litigation over the fraudulent preferences and such, they had a real problem in distributing and who owned what.

And they had the potential issue that they were facing of what we call a roll-up, that is, if the bankruptcy court could see that these interests were oversold, it does have case law precedent for rolling up those direct lender interests, actual ownership interests, constitutionally-protected property interests, it does have case law authority for rolling those up so that they become assets of the estate, not of individual direct lenders and then to make thereafter an equal distribution to everybody.

That, of course, would have been a horrific result and would have hurt a lot of people. A lot of people have been hurt already.

So they came up with a brilliant scheme, and that is to adopt a plan of arrangement, plan of reorganization, that they would push through the court in very fast order, six to nine months max, usually these cases take two to five years.

They would thereby diminish the fees, they would get a confirmed plan, and basically the plan would be to sell the servicing rights. They would sell the servicing rights. They would sell the direct lender interests that were owned directly by USA Commercial still, and they would end up with a pot of gold, and from that they would make distributions, and they would also pay for attorneys fees and such to litigate all these items that had to be litigated in the bankruptcy.

So they did it. Judge Riegle confirmed a plan and approved a high bidder which was Compass. Compass was the purchaser, and, of course, there's a little bit of an issue, but known or unknown to the direct lenders at the time, Silar -- you are a mutual fund company, correct? You're a mutual fund or are you wholly owned by one or two institutional investors?

MR. MAJORIE: There are institutional investors. It's not a mutual fund, your Honor, it is a limited partnership of investors.

THE COURT: Okay. So those -- Silar loaned the money for Compass to purchase.

Now, there is a significant issue that we'll hear today, and that is whether Silar actually involved itself in an asset repurchase agreement, a repo agreement, that are specifically identified in commercial law, they're identified in tax law, and, of course, they're identified in bankruptcy law.

There are special provisions in bankruptcy law for these repos. Banks on Wall Street were engaging in these transactions all the time. They would lend money to an ultimate lender like a warehousing loan, and they were in the practice previously or anciently of taking big warehouse groups of mortgage loans and such.

But a couple of decades ago they developed the process of repurchase agreements, that is, in order to protect themselves, that is ultimate lender, from a bankruptcy by their sublender, they would actually purchase the underlying notes and deeds of trust and security instruments with an obligation to put them, place them back with the sublender at the appropriate day and time.

So these repo agreements have been around a long time, probably more than a couple of decades, right? But, of course, as part of the last Wall Street meltdown, they played not an insignificant role amongst banks.

But one of the major issues here today is whether those repo agreements actually transferred title to Silar and making Silar thereby law ramifications, but at least in these motions, thereby potentially liable for the conduct of its agent, the actual servicer, Compass, or whether or not it was, in fact, simply a loan from Silar to Compass to allow them to purchase all these assets and with a secured interest back. That's part of the issue we'll talk about today.

Ultimately, I think Compass paid some 58 million, only four million or so, four to $6 million for the servicing rights, but the rest for remaining direct lender interests that had not been sold or distributed out by USA Commercial. So it's a substantial chunk of money.

And the plan called for all the servicing rights to be sold. There were major objections. Many of the direct lenders did not like Compass, did not like who Compass was and the fact that they were going to be their new agent and new servicer, and so there were objections.

There were also many who wanted to take over the servicing themselves, many, I'm sure, a majority of direct lenders in a few notes that wanted to take over the servicing themselves.

And so they made a claim, a major claim in the bankruptcy case. These are executory contracts, and you can't assign these out, Judge Riegle, unless and until they're

cured, unless and until all of Compass's defaults and irregularities have been cured, or Compass's rights terminated, you can't assign these contracts out.

Judge Riegle ruled to the exact opposite. She said no, I'm not going to treat these as executory contracts, we're not going to sell them and change any of the rights of the direct lenders or any of their obligations, we're just going to sell these free and clear of any claims of the bankruptcy estate, but, basically, these LSAs, loan servicing agreements, between USA Commercial and the lenders will flow through the bankruptcy totally intact, no alteration of their rights on either side.

So if they have a right to terminate their contract with the servicer, they have that right, it continues under Nevada law or under the LSA contract language.

So that's the way she concluded it. It was appealed, of course. I sat on the appeal with Judge Pro. And ultimately the plan was confirmed and the order confirmed.

Then, of course, Compass raised a very significant issue, first in the bankruptcy court. They said that we have some significant parties, direct lenders, primarily represented and led by a Ms. Donna Cangelosi, who is interfering with our purchase of these servicing rights. She's sent out e-mails and solicitations, she wants the servicing rights herself, and she's soliciting direct lenders

not to cooperate with and us, secondarily, to in fact adopt her and her new-formed companies as the new loan servicers.

Judge Riegle got a little upset at that. She issued an injunction, at least a temporary injunction.

Several of the parties filed complaints in this court. One of the cases filed down south in my court was a case file, I believe -- is that 892? That was filed by various of the direct lenders against Compass and Silar and others.

Another case was filed up here, I think by the Compass side, or Silar side, I'm not sure which, in front of Judge Reed, and Judge Reed ultimately transferred that case to me. All of those cases, about three or four of them, have been consolidated into the 892 case in front of me.

And, basically, it's for -- on Compass and Silar's side, a declaration that there is contempt of the various injunctions, that they are entitled to the servicing rights, that there's no right to terminate those servicing rights except upon a showing of cause, and there has been no cause for Compass's and ultimately Silar's termination, and therefore a declaration that they cannot terminate those servicing rights, also, a declaration that they have a right first in order to default interest which amounts to very large numbers, and in excess of and prior to the rights of direct lender owners of the note to their principal and interest.

So, for example, in one loan we had -- I think the Gess loan was ultimately a $24 million loan, or was it 50 million? It was --

MS. CHUBB: Twenty-five.

THE COURT: $45 million?

MS. CHUBB: Twenty-six, sorry.

THE COURT: Twenty-six, and Compass could not get -- this is just an example, Compass could not get the cooperation of the direct lenders, they would not make advances for preserving the property or note. There was litigation on the other side with the borrower.

And so, finally, Compass made several attempts to sell the property even after foreclosure and could not get anybody's consent.

They proposed sales at 16 million and 12 million, the property value was going down, and ultimately they came in said, Judge, we've had enough, we want to sell this note and/or property, foreclosed property, for $8 million, and we want to keep out our servicing moneys other than arrearages and advances on taxes which amounted to over a million dollars. The rest, up to the $8 million, we believe, comes first to us, the servicer, for default interest and late charges, and therefore really nothing, if anything, goes to the direct lenders who actually owe the note.

So we litigated that one on an emergency basis, and

the Court made preliminary rulings. We looked at the language of the LSAs and said no, in a case where you are collecting far less than the principal amount of the note and far less, certainly, than any accrued regular interest, you do not have the right to retain default interest and default interest rates or excess late charges. You must first answer the principal and interest, and, of course, you are entitled, right off the top, to any of your advances, you're also entitled right off the top to your regular servicing fee for collections and distributions on the note, but otherwise the next layer goes to the direct lenders.

Now, that would be very different, of course, in a case where Compass and/or Silar is collecting all of the principal and interest and moneys in excess. Then, of course, clearly, Compass, and now Silar/Asset Resolution, has the right to accelerated or default interest rates.

Now, one other wrinkle, and then I'm just about through with the background.

Compass, of course, defaulted. It was not doing well in the litigation, and it wasn't doing well with regard to the servicing rights.

In this case, 892, many of the direct lenders claimed that Compass was involved in a scam and a further fraud, just like USA Commercial.

There are some quotes, evidential quotes, for

example, from Piskun, et al., who owned Compass, to the effect that we can really make a killing here on these advanced or accelerated and default interest rates, and we can also make a killing by withholding various fees before we have to make any distribution to direct lenders. So there are some quotes to that effect.

It's still at an evidential stage on that issue, but, in fact, those allegations are made part of this complaint, 892, and, in fact, Piskun, et al., have defaulted. Compass defaulted.

And Silar then, in preparation and prior to the default of Compass, transferred all of Silar's rights, all of these things that they were purchased, they were all transferred to a wholly-owned subsidiary of Silar, Asset Resolution, and it was Asset Resolution now that was in the position to take possession of all these assets upon Compass's default, and they did that.

They served a letter. One of the issues raised in the motions for summary judgment is this smells, looks like, tastes like a purchase because there was no UCC foreclosure by Asset Resolution or Silar upon Compass and all of these servicing rights and direct lender interests, rather, it was just a simple letter saying you have not complied with the asset purchase obligations, and therefore we have no obligation in the future to reconvey these assets to you, we

own them, and we are servicing them. And Asset Resolution took over that task, and it's assigned to a subservicer, I think, SOS.

Now, Asset Resolution's interposition here in this court was not approved by the Court. It was acknowledged by the Court, but it was not approved.

So early on in these cases we had a real issue as to whether Compass was licensed in the State of Nevada to be a servicer, whether it had to comply with Nevada law in its fiduciary obligations to the direct lenders, and the Court made it very clear, yes, it does, and it has to be licensed or it has to have a sublicensee who is licensed in the State of Nevada. Silar was not, of course.

And so when Silar proposed the interposition of Asset Resolution on its behalf, Asset Resolution wasn't a licensee in the State of Nevada, the Court said, well, I'm not approving that, but there's nobody else here, Compass is gone, they're being defaulted, not only in this lawsuit, but they're being defaulted on their servicing rights, if you will, so Asset Resolution is the only one sitting here to service these things. So I will acknowledge the transfer of the servicing rights to Asset Resolution from Silar, but I'm not approving it. It's not in accord with the procedure that we had laid out for getting authorized, Nevada-licensed servicers.

That was the process, and then, of course, this

whole action has heated up. We've had a number of other notes that came to fruition and came to emergency status.

And we've been -- I gave very clear indication to the direct lenders that the injunctions that I had entered and Judge Riegle had entered to protect the servicing rights in Compass's and/or Silar's names, those injunctions would protect their rights.

But I also gave very clear indication, Judge Riegle said these contract rights, LSAs, flow right through, and therefore you continue to have any right that you had under the agreements or under state law to terminate those servicing rights and take them yourself.

I gave them an open invitation on many occasions to file emergency motions, and, of course, they did. We put those motions off and off and off, and it is folded up now into this trial, 892, that we're looking at here in the next couple of weeks.

That's where we stand.

Now, we're looking at the summary judgments for consideration here today, and I do have some preliminary feelings on these motions, and I'm willing to give those to you unless you want -- I'm also willing to recognize that in a third of these cases, a quarter of these cases, oral argument persuades me to go a different direction. That happened on Friday on a major case not related to USA Commercial. They

got me going 180 degrees.

So if you don't want to hear it, you don't have to hear it, you can go ahead with your argument, or I'll give you a preliminary feeling, and then you can use that to direct your arguments if you wish.

MR. COLLINS: Your Honor, I think it would be helpful, at least our side of the table thinks it would be helpful to hear your tentative rulings.

MR. MAJORIE: We agree, your Honor.

THE COURT: Okay.

MR. MAJORIE: If we can focus --

THE COURT: Okay.

MR. MAJORIE: We're from the same school so --

THE COURT: And I'll try to keep a -- good. Awesome. Nice to hear that. I won't ask what school nor what class standing or rank.

I'll try to keep an open mind even though I'm stating some preliminary feelings.

We have a number of motions for summary judgment. A couple of the major ones, the first major ones are docket entries 1687 and 1702.

1687, in essence, is almost uncontested. It's a motion, very substantial, that alleges on behalf of plaintiff, the direct lender side, that Silar has no standing. It assigned -- it is a defendant and a counterplaintiff here, but

it has no standing because it assigned all rights to Asset Resolution.

And, in fact, the language of the assignment is very, very broad. It goes on to include any and all choses in action, any and all causes of action, or complaints against any of the direct lenders, for example, or anyone else. So it's very broad assignment language.

And the plaintiffs here have said in a motion we want them dismissed because they have no standing on their countercomplaints to sue us. Asset Resolution has whatever they had.

And Compass, of course, is defaulted. I've taken their default. I did tell Compass and Piskun, the owners of Compass, that they could participate in the prove-up, the evidential phase of the trial, but they are a defaulted party, and, otherwise, they await ultimately a judgment against them.

But Silar, and I agree, does not have standing because of that assignment.

Now, Silar has said in response, we agree with that, but a logical predicate to that is that Silar is not the owner. We were the lender to Compass. We did not own these notes and servicing rights in spite of the language of the repurchase agreement.

And why do they claim that? Because, of course, they are seeking buffer against any liability claimed against

Compass for Compass's conduct or against Asset Resolution, for that matter, although, of course, there there's a different issue.

I think I'm in a position to say that I certainly will approve this motion to say that Silar does not have standing, but I'm a little bit up in the air on this additional question of sale versus loan.

Now, that takes me to 1702, docket 1702. Was this a sale or was it a loan from Silar to Asset Resolution? And I have previously indicated on a number of occasions that this looks, smells, tastes like a loan to me.

Compass was put in a position of servicing these servicing rights, they had major interaction with all of the direct lenders. Silar sat back in the wings unless and until Compass's default.

On the other hand, the parties have presented to me some very good points and authorities that, under New York law, which is the effective law, that these really are repurchase agreements conveying total title to Silar, and there's some good issues there which you'll address, please.

There's tax case law that probably isn't quite so applicable. There's New York law which probably is directly relevant. There's also bankruptcy law, of course, in deciding what kind of an animal this is.

The bankruptcy code expressly recognizes repurchase

agreements and gives them special status. A sublender who walks into bankruptcy with a normal loan obligation to its ultimate warehousing lender holds everybody off for an infinite period of time, and the ultimate lender doesn't have much recourse.

But with these repurchase agreements, Congress gave special status. They said no, the bankruptcy court will recognize these as owned by the ultimate warehousing lender, and the sublender who files a bankruptcy can't hold that warehouser off, they can proceed with all of their rights.

So there's bankruptcy law that's applicable, too, and it is making tentatively some sense to me that it's New York law that applies and gives -- which read very like repurchase agreements that transferred totally the ownership rights to Silar with an obligation to retransfer them if Compass complied with all of its obligations.

On the other hand, that doesn't end the issue because, even if Silar and/or Asset Resolution are liable for the conduct of Compass, they're not liable for any conduct outside the scope of the employment of Compass. Compass was employed, if you will, to be the servicer, and the servicing obligation was transferred, if not the purchase.

So, clearly, under that theory, if Compass engaged in an act or conduct within the scope of its duties, ultimately the owner of the servicing rights and the direct

lender interests would be obligated to cover for that conduct but not fraudulent conduct.

If, for example, Compass had an intent to defraud all of these direct lenders, we're going to embezzle, we're going to illegally transport off, we're going to deny these moneys, that certainly would be outside the scope of anything they were retained to do by Silar and/or Asset Resolution, and I don't know how Silar could be held responsible for that.

So if, for example, Compass made a decision, you know, that we are going to withhold temporarily a million dollars on payouts, Silar must recognize that and account for that.

But, on the other hand, if Compass did something fraudulent, I don't see how Silar and/or Asset Resolution can be liable for that.

It goes a little further than that. Part of the claims in this lawsuit are that Compass, and, ultimately, Asset Resolution and Silar, improperly claimed default interest and late charges in derogation of their fiduciary duties and in priority to the direct lenders who were the owners of the notes.

But, as we'll see, what's good for the goose is good for the gander, and the movants here in some of these motions have said, you know, we're not liable, and we want you to grant summary judgment on our behalf on the claims coming from

Silar because we had the right, for example, under the LSAs to make claim -- to file a lawsuit here, to make claim that Silar and Asset Resolution had no priority, that we stood first in priority and, therefore, as a matter of summary judgment, you can't hold us liable.

Well, the same thing works on the other side. Silar and Asset Resolution had the right, under ambiguous language and ambiguous law, to claim that we do have the right and even to file a lawsuit to assert that right that they have the priority right to default interest, late charges, normal servicing fees before even the first penny is paid out to direct lenders on the principal of the note.

And, of course, they were pointing at the language in the various notes. The lender, under this note, will apply all receipts first to interest, including default interest and late charges, before we apply to it principal.

So I'm sure that that same argument cuts on both sides. And so even though I am now -- that's a question mark, and I'll expect your final convincing arguments on whether this is a sale or a loan, I'm not sure it does anything but leave us in the same position. That's 1702.

1704, summary judgment -- let's see. This is summary judgment filed by the plaintiffs, again, direct lenders, on plaintiff's liability. That follows 1702, doesn't it? That follows from 1702. I may be a little confused,

but -- so my inclination here is to grant that.

In 1706, also a motion for dismissal filed by the plaintiffs, direct lenders, and/or summary judgment, they raise a *Twombly* U.S. Supreme Court issue, that is, the complaint does not assert a proper cause of action against some of the -- well, let's call them the Jones Vargas direct lenders.

The Jones Vargas direct lenders are some of the defendants. Also, of course, the LLCs and the other entities formed by Ms. Cangelosi are defendants in that action, that Cross action, if you will.

And the complaint lays out lots of complaints and bad conduct by Ms. Cangelosi and the LLCs that she formed in attempting to terminate unfairly Compass's servicing rights, but it does not lay out any factual basis to pull in these other 54, 50-some-odd Jones Vargas direct lenders.

They did not join Ms. Cangelosi's LLCs, they did not -- so the claim goes. They did not participate in the e-mail program and the slander program against Compass's servicing rights.

They were standing up for their rights, and they filed lawsuits and such, but there's nothing in the complaint and under *Twombly* to tie them in, and therefore that should be dismissed.

If we were in the early stages of this litigation, I

would be very strongly tempted to grant that one. I agree with the argument.

Part of the problem -- there's two problems with this motion, however. Number one, it may be moot depending on the resolution of Silar's involvement in this case and whether they're out on standing grounds and/or whether they're out on liability grounds, purchase versus loan.

But, also, it's too late. You know, we're here two weeks before trial, and it's a little too late in my mind, even if I hadn't given you deadlines that cut off motions to dismiss under *Twombly*, it's too late to ask for a recharacterization of the complaint to comply with *Twombly*.

So that motion has a couple of problems with it.

Now comes Silar's motions.

Let's see, the first one here was 1710, docket 1710, and that's a standing issue. Let's see. That's a -- no, that's not Silar's, that's -- who filed 1710? That's also a standing motion.

MS. CHUBB: I think it's Ms. Rasmussen's.

THE COURT: Ms. Rasmussen, and I'm inclined to grant that motion, too. She raises the same standing, she's piggybacking on top of 1687, the standing issue, and, of course, and therefore it makes sense to apply the same analysis.

Now comes Silar's motions. The first one is 1711,

and that is that Silar is not -- a motion that Silar's not responsible for Compass's acts based upon the sale versus loan analysis and other grounds.

I'm adding to that, of course, the grounds that you'll want to address in your motion for summary judgment, even if you are the purchaser, that, in essence, you're still not liable for any conduct of Compass outside the scope of that engagement of Compass.

So my present inclination is to grant in part and deny in part that motion.

Silar probably is not responsible for Compass's acts, but it is, of course, potentially responsible for Asset Resolution's conduct, but, again, with the caveat that I'm not sure Asset Resolution's insistence upon priority payment of default interest, even though the Court is disagreeing with that position, I'm not sure that that's bad conduct of any kind.

Then comes 1712. This is the LLCs. This is Silar against the LLCs, no standing. This is 1712.

My inclination right now is to grant that, but, of course, I'll want to hear your refining comments on the briefs that I've reviewed.

1713, finally, is again by Silar, that when it comes to the issue of whether or not all of these payments coming in from borrowers get applied to interest first, including our

default interest or principal, there is, we agree and acknowledge and concede, a right and election in the note language by the direct lenders, that is, upon direct lenders election, this money can be applied first to interest and then to principal, or first to principal and then the interest, including default interest. But, by gum, they've made no election. There's nothing, no proof in the record, no evidence anywhere that they made any such election that all moneys would come first to principal before Compass and servicer would get any distribution of default interest.

I'm a little up in the air on that one, deny or grant.

That's my predilection, and you will get, of course, very detailed written decisions, but that's a summary of it.

Again, I'm a little bit up in the air on some of those issues, and I think we ought now to proceed with your final arguments.

Let's address first 1687, that's the standing issue.

MR. COLLINS: Your Honor, Michael Collins for certain direct lenders.

With respect to that motion, obviously, we would agree with the Court's analysis, and, obviously, we step back a second --

THE COURT: Let me stop you. I need to say one other thing for the benefit of the mediation.

You know, Asset Resolution, to protect itself, filed a bankruptcy in New York, and it believed that -- in my opinion, it believed it was circumventing this Court's orders.

I had attempted to maintain the status quo and to benefit Compass and Silar's servicing rights and to protect Judge Riegle's order and confirmation order.

But then, when I made a ruling, especially in the Gess loan, that Compass/Silar Asset Resolution did not have a right first to default interest, that the money first had to go to the direct lenders on principal, I have ruled previously as a matter of factual finding, that Asset Resolution came up with a way to go around the Court's orders, and, that is, it filed a bankruptcy in New York, Judge Gonzalez, I believe.

And it hoped thereby, in essence, to do what the prior bankruptcy of USA Commercial had not done, and that is to roll up all the interests, roll up all the servicing rights, get a declaration that nobody had any right to terminate those servicing rights, to get a resolution in another court, in front of Judge Gonzalez, the waterfall issue, that is, who has priority to payments from borrowers, and that they would accomplish it in that fashion.

This Court, of course, took umbrage at that tactic, and I ordered, of course, the parties here in the 892 case to move to lift stay. They worked in the bankruptcy court in New York, they sought a transfer of venue first to Nevada,

bankruptcy, which was approved, Judge Gonzalez agreed, this case belongs in Nevada.

It's a bankruptcy case. I'm not addressing yet dismissal or anything else. This Chapter 11 will be transferred to Nevada, and Judge -- not Judge Zive, rather, Markell, bankruptcy judge colleague and brother, he had the case, and it was proceeding apace with early motions and such, including huge fees to be paid out, $5 million for transfer of servicing and withholding of moneys, all moneys collected for payment of the attorneys and the servicing rights, all in derogation of the direct lenders.

And, of course, the direct lenders took umbrage at that, and the Court took umbrage at that. So I exercised my authority to withdraw that case, and I withdrew that case, and I received assignment by consent of Chief Judge Hunt of that case, and the case was then in front of me, the Chapter 11.

Upon motion of the direct lenders and other claimants in that case, I converted the case to a Chapter 7 and appointed Mr. Leonard, the trustee, for Asset Resolution.

My finding was to the effect there was no reorganization right. This was a shell company, Asset Resolution was a shell company, it did not previously exist, it was formed for only one purpose and, that is, to hold the assets and protect Silar who was its wholly-owning parent.

It had no reorganization potential. The only

liabilities it really owed, other than liabilities under this lawsuit, were to its own attorneys to undertake that effort.

So, on that basis, the Court converted that case, transferred all of Asset's properties and rights to Mr. Leonard, the trustee. That's an additional basis for lack of standing here by Silar/Asset Resolution, et cetera.

Now, the reason I say that is because -- and that's predicate to the mediation, is because that issue is on appeal. The Ninth Circuit has stayed my order, any order terminating the injunctions previously issued, those injunctions which protect the servicing rights.

I don't think that order applies at all. It's my opinion that stay from the Ninth Circuit does not apply to any declaration under Nevada law, under Judge Riegle's prior order, that fifty-one percent or more of the majority of the direct lenders have terminated those rights as is their right to do.

Judge Riegle clearly held, and it was part of those injunctions and other orders, that at any appropriate time under the LSAs or under Nevada law, 51 percent had the right to terminate those servicing rights.

So it's my opinion that a declaration or prior declaration in January, I think, of this year declaring all of those service rights terminated upon conversion of the case has no impact one way or the other upon that ultimate Ninth

Circuit stay which I think was issued after that January order anyway.

So what we're doing here in acknowledging new servicers appointed by 51 percent or more is simply acknowledging their rights. I'm not transferring any rights from Compass or from Silar in derogation of those injunctions.

The reason I bring that up, however, is to state that that is on appeal, and, as I understand it, the issues before the appellate court, Ninth Circuit, are the withdrawal, the conversion of the case allowing service rights to be acknowledged in other parties other than Silar and Asset Resolution. Those are issues on the appeal.

A writ of mandamus was denied, and further stays were denied. So those issues are squarely before the appellate court.

So there is a chance, of course, here -- I see it as a one percent chance, but there's a chance that the Ninth Circuit --

MR. MAJORIE: I have two, Judge, anybody, two percent?

THE COURT: Right.

-- will reverse me, and, of course, undo everything we've done and the miles of river that we've come down. But that is a factor in the mediation, of course, and should be an element in value -- in settlement value.

Also, very substantial issues for mediation purposes are the legal rights claimed by Silar and Asset Resolution to the waterfall issue. We have the first dollar that comes out of every lender's, every borrower's payment because we have the right to collect, not only our servicing fees, our advances, of course, but also default interest, late charges, and, therefore, ultimately, on a lot of these notes and properties that have been foreclosed upon where the value has gone down so drastically over the last year, 10 percent, 20 percent of ultimate loans, really the direct lenders will get very little, if anything.

So that's their claim. And we'll hear, of course, the legal basis, and if I make the rulings along the lines that I've said that I am contemplating making them, there's still a chance that the Ninth Circuit could reverse those.

Silar and Asset Resolution does not have a lot to gain if my rulings are upheld. They do have normal servicing -- for example, out of the Gess loan, instead of 6, $7 million, they were limited down to some $90,000, their regular servicing fee.

So that's what's at stake, and there's wide disparity in the dollar amounts, but my impression of the way this case is going to come out as a result of the summary judgment is we're probably not even going to need a trial, and I'm probably going to -- if I find Ms. Cangelosi -- I've

already found her in contempt. If I award any damages, they will not be substantial or significant.

There will probably be no damage awarded against Silar and Asset Resolution, and, in essence, the direct lenders will walk out of this court, after a number of years of being held up here, with the notes and control of the notes that remain and their value. That's probably where this case is coming out.

But, of course, Silar and Asset Resolution have a big dollar figure to protect on behalf of their institutional investors. They're a private entity, private partnership.

And, of course, the direct lenders have everything to protect. They have -- this represents livelihood investment by some of these people and, if not, a very substantial investment in these millions of dollars worth of loan portfolio.

I'm sorry for the digression, but I needed to do that to give the background to the mediation as well.

Let's do final resolution now, 1687 first, please, standing for Silar.

MR. COLLINS: Your Honor, the motion, as has been recognized, I think, by all the parties including Silar, is a very simple motion.

We contend that Silar does not have standing to assert any of the counterclaims that it's asserting. Why?

Because of the terms of the omnibus assignment and assumption agreement -- and, your Honor, we're having a little trouble -- I don't know if there's a button back there that had to be pushed or something.

THE COURT: I've got it. Let's see. Oops. It's coming I think. Is it turned on there?

THE CLERK: I do have it here.

THE COURT: Put a piece of paper there.

MR. COLLINS: There is, your Honor.

THE COURT: Okay.

MR. COLLINS: Or I can hand up copies to your Honor.

THE COURT: I just can't see it from this distance.

MR. MAJORIE: Your Honor, I just don't want to press the wrong button. Can I turn this on or --

MS. CHUBB: They don't seem to be going on.

THE COURT: Hang on. I've got my screen on, too. It's just not getting the signal. It connects to a little computer down there in the cabinet, and so -- could be that the computer in the cabinet is turned off.

Okay. Let's proceed, please.

MR. COLLINS: Your Honor, I have a hard copy if you want one.

THE COURT: Okay. What are you handing up?

MR. COLLINS: The omnibus assignment and assumption agreement.

THE COURT: I've got it here.

MR. COLLINS: Okay. Perfect. In case, they need a copy, your Honor.

That is the basis for why we contend they don't have standing.

In their response, they say, well, we agree, if we are just a lender, we don't have standing for these claims, but, if we are the owner of the assets like the direct lenders contend, maybe we have standing.

But that ignores the real terms of our argument which is it doesn't matter if they're a lender or owner --

THE COURT: You're relying on the post assignment from Silar to Asset Resolution which transferred all of those rights, having nothing to do whether it was a loan or purchase, they transferred all of their rights including choses in action.

MR. COLLINS: Absolutely, your Honor.

THE COURT: Okay.

MR. COLLINS: It's that simple.

The Court, in its preliminary ruling, recognized the language that said choses of action, causes of action, it was all the purchased assets which were all the direct lender interests held the loan servicing rights and any cause of

action related thereto.

And in their response, they don't seem to even address the existence of the omnibus assignment and assumption agreement. So we think, your Honor, it's very -- it's really that simple, we're entitled to summary judgment.

THE COURT: Thank you.

MR. MAJORIE: I think your Honor's analysis of our position was correct. I also would like to highlight for the Court, however, a couple of things that --

THE COURT: Is my analysis correct whether or not you're the owner or simply a lender?

MR. MAJORIE: No. And I would explain to your Honor why.

If I'm responsible for the acts of Compass, and leaving aside the outside the scope --

THE COURT: As the owner of the servicing rights, if you're responsible for the acts of Compass --

MR. MAJORIE: Then I would have to defend those acts.

THE COURT: Sure.

MR. MAJORIE: And to defend those acts, I would be entitled to show, for example, third-party causation of damage.

I would be entitled to show that the group was really estopped from asserting those claims because of their

own conduct.

I would be entitled to show that they were in prior breach of --

THE COURT: No, you wouldn't. Asset Resolution would.

MR. MAJORIE: Simply as a matter of defense, your Honor, I've transferred my causes of action, but I didn't transfer my ability to defend myself.

Nothing in that omnibus agreement --

THE COURT: Are you saying by way of offset or are you saying by way of affirmative actual claim against direct lenders, for example, the Asset Resolution rights.

MR. MAJORIE: I'm saying two things. I'm saying, number one, by way of estoppel, or simply a factual defense, that the cause -- the damages that were caused were caused by -- the acts that underline the counterclaims are still also a defense factually to the causation argument about damages.

In other words, our argument is that to the extent the plaintiffs were damaged, they were damaged by their own -- by the wrongful acts of this group rather than the wrongful acts of, say, in this case, Compass.

THE COURT: Well, that's true. You can always raise a defense, we're not responsible, you're responsible, plaintiff, yourself.

But you do not have standing still to bring an affirmative claim against them for damage flowing to Silar because Silar transferred all of its rights to Asset.

MR. MAJORIE: I absolutely agree with your Honor about that.

THE COURT: Okay.

MR. MAJORIE: That was the nature, but I wanted to be clear to the Court that our view is, if we're still in the case on liability grounds, essentially the counterclaim issues, although not a matter of affirmative recovery on behalf of Silar, but all of our assertions relating to those counterclaims --

THE COURT: Okay. We'll get to those issues.

I agree with you. I don't think you're cut off from any defense, but you do -- standing you do not have. That will resolve it.

MR. COLLINS: Right, your Honor. My motion wasn't trying to get to any defenses --

THE COURT: I'll write a detailed decision that embodies that.

1702 which gets to the heart of the sale versus loan, please.

MR. COLLINS: Your Honor, Michael Collins again.

And I had a short handout that I was going to use on the machine that, again, I can hand up to the Court. It's not

an underlying document, it's a series of quotes from the MRA and certain other documents. If you would like, I could hand you a copy.

THE COURT: Please.

And I think I have most of main arguments. You'll want to emphasize some to persuade me. We've got the various factors that different courts have given us to determine whether an animal is a sale or a loan secured by a UCC financing.

And we've got the tax case lines of authority where, in essence, taxing authorities are very interested in who is the actual owner. When it comes to receiving moneys, are they received as interest, are they received simply as repayments of loans, et cetera.

We've got the New York law line of cases which, of course, strongly emphasize the intent of the parties and the language of the contract.

We've got section something-or-other in the bankruptcy code that acknowledges the exemption for repurchase agreements from the normal automatic stay and hold-off powers of a debtor filing in bankruptcy.

That seems to me to be the core of the argument, and --

MR. COLLINS: It is, your Honor.

And, in essence, there's two different views of the

world. We contend that those tax cases, which pretty much is what they rely on, if you agree with us that those tax cases are not applicable to our situation, we think we prevail.

We don't think there's any real argument other than that tax courts, your Honor, are not looking out to what the parties intended, it's looking to the substance of the agreement. We know from law school that the IRS always looks to the substance of agreement, not the form.

So therefore, your Honor, for tax purposes -- and they have a very different understanding of the agreement in question.

But our question is, your Honor, between Compass and Silar, under New York law, we know under New York law, it's -- the issue is what did the parties intend, the parties to that agreement, Compass and Silar. It's not what the tax implications may be.

And, your Honor, a little analogy there is, corporation -- C Corporation is taxed at the corporate level. You can have a Subchapter S corporation in which its taxed at the owner level. That doesn't mean, though, it's still not a corporation entitled to limited liability for other purposes.

So often there may be a different tax treatment for a document than there is for other purposes, and we know that under New York law, your Honor, because the cases we cite recognize, even the Supreme Court in a tax case says this is a

tax case, for other purposes, this may be something different.

And so, your Honor, what was the intent here?

Compass was a shell that was created to take over the servicing. We know it had no other business, was created to take over the servicing rights it purchased from USA Capital Mortgage.

Well, your Honor, therefore Silar wanted to make sure -- and this is why the document was structured the way it was is it's a shell, it's a new business, we don't know what's going to happen, we did give it a lot of money.

There's no doubt, your Honor, that they gave a lot of money to Compass, but what did they take in return, a security interest, or did they take actual ownership of the assets?

And, your Honor, the plain language of the document, the MRA, makes absolutely crystal clear they took absolute ownership. Why? To protect themselves. They wouldn't get caught up in a Compass bankruptcy. They wouldn't get caught up in a complicated foreclosure proceeding under the UCC. They would just send, like they did, that one-page notice saying you defaulted, we have no obligation to give it back to you, to sell it back to you, no obligation whatsoever.

So, your Honor, the document that I handed up has quote after quote from the MRA, and one of the most important ones, your Honor, is Section 9(a), seller, which is Compass,

and buyer, Silar, intend that the transactions hereunder be sales to buyer, Silar, of purchased assets and not loans from buyer, Silar, to seller, secured by the purchased assets.

They couldn't make their intent any clearer.

And then, your Honor, we go through and do that over and over again of other provisions that make that intent absolutely crystal clear of what Compass and Silar intended for that document to mean and its legal effect between the two of them. It may have a different legal effect as to the IRS, but as to them, they wanted to have an absolute sale.

Your Honor, that's confirmed in the UCC statement on the second page, section D. We quote from the UCC statement that was filed. The buyer-secured party, which is Silar, and the seller-debtor Compass, intend the transactions contemplated by the master repurchase agreement to constitute a sale of the purchased assets, and this filing should not be construed as a condition that a sale has not occurred, or to indicate that it is necessary if not required.

So, your Honor, they made it crystal clear.

Now, again, they had good lawyers all over the transaction, major New York law firms, maybe even firms from other jurisdictions, too, they all put a belt and suspenders on it. We intended this, but if, for some reason, somebody disagrees with us someday, we still have a security interest to fall back on.

But they made it very clear again, after the transaction -- in connection with the transaction, just not just in the MRA but in the UCC statement, that this is a true sale to Silar to protect Silar.

Your Honor, we then quote from the omnibus assignment agreement which is further evidence. We quote from the subservicing agreement in connection with the assets, again, demonstrating the intent that it was a sale to Silar.

Your Honor, you asked about the bankruptcy implications and how they impact here.

Section 35 of the MRA provides that the transactions and MRA were a repurchase agreement and a master netting agreement as defined in 11 USC Section 101, and a securities contract as defined in 11 USC Section 741.

They wanted, again, to make crystal clear for all purposes. So they said to themselves how can we make it clear to any court, to any party, this is a true sale. We'll say it over and over in the MRA. We'll say it in all the accompanying documents. We'll say it in the UCC, and we'll refer to those bankruptcy provisions.

And those bankruptcy provisions were put in for very important reasons and very particular reasons.

THE COURT: You seem to concede, however, in the reply that this may not qualify as a purchase under the bankruptcy provisions. Is that the case, or no?

Your language just said that it's New York law that really matters, it's certainly not tax law, and it may not even be the purchase-repurchase provisions in the bankruptcy code that apply.

MR. COLLINS: Right. Exactly.

THE COURT: For example, we have the case cited, recent bankruptcy case from Delaware citing that an animal that transfers servicing rights, as opposed to underlying loans, does not qualify as a characterization of a sale and repurchase agreement under the bankruptcy code.

MR. COLLINS: That piece that was split off, your Honor, not the underlying repurchase agreement necessarily. But if the servicing rights were retained by the debtor, that would create, in essence, two transactions instead of one.

Here, your Honor, we had the assets transferred to Silar, we had the loan servicing agreements transferred to Silar. In that case, Compass, in essence -- and that was -- along with Compass, didn't transfer over the servicing rights.

THE COURT: They recharacterize the agreements, they say, no, it was a retention of servicing rights by Compass.

MR. COLLINS: Right, right. Versus here, your Honor --

THE COURT: And therefore ought to be split off.

MR. COLLINS: Right. Exactly. Absolutely, your Honor.

THE COURT: Yes? Absolutely, under the Delaware case, that therefore the bankruptcy provisions do not apply, that they can be -- they are severable and the servicing rights, in fact, were retained, and, against those servicing rights, there's simply a UCC security interest.

MR. COLLINS: As to the servicing rights, absolutely, your Honor, because the intent of the parties wasn't to transfer that over. The court said that's something different from the repurchase agreement. There was a separate -- the servicing rights didn't go over.

We know from --

THE COURT: Well, what is it that they purchased, then, under that analysis? What is it that Silar purchased from Compass?

MR. COLLINS: It purchased direct lender interest.

THE COURT: Right.

MR. COLLINS: It purchased the servicing rights, the rights under the LSA, and then --

THE COURT: They argue to the contrary. They say there was no purchase on the servicing rights because, under the Delaware case, they were retained by Compass, and therefore, as to the servicing rights, they're severable and

it's not a sale, it's a loan and security interest.

MR. COLLINS: Your Honor, that goes to the actual terms of the agreements. I'm not disputing that that's what the Delaware case found the parties intended there.

THE COURT: You're just saying this MRA does not so provide. It provides for a sale of -- and a redesignation of agency status as opposed to a retention by Compass.

MR. COLLINS: Absolutely, your Honor. Absolutely.

Silar owned the servicing rights, allowed, as subservicer, Compass to service those rights during the time period, but the LSAs were transferred to Silar, and that is what makes the Delaware case distinguishable factually. It's a different type case.

We talk about the Granite Partners case which we believe is right on point. There's actually a form agreement, your Honor, that has been developed by a trade association in New York, then it's modified to a particular circumstance.

But our agreement looks very much like the MRA that was in the Granite Partners case in which it was found to be a repurchase agreement, a true sale of the rights.

So, your Honor, that's what we have here. And it was very purposeful, your Honor, because, again, what did they want to do, not get caught up in a bankruptcy, not get caught up in a foreclosure proceeding, to be able to send that

one-page notice that they did.

So we're not arguing those tax cases are wrong, your Honor. We're just saying that they're distinguishable for a whole different purpose.

And the case law recognizes that there can be a hybrid depending on why you're asking the question.

THE COURT: Okay.

MR. COLLINS: But for these two parties to now say, well, we didn't mean it. When we said we intend this to be a purchase transaction, we didn't really mean it.

THE COURT: I think I got it.

MR. COLLINS: Thank you, your Honor.

MR. MAJORIE: Thank you, your Honor.

I will focus on what your Honor has focused on.

In the agreement, paragraph 31 has a severability clause, and it says, quote,

> "If any provision of any program document is declared invalid by any court of competent jurisdiction, such invalidity shall not affect any other provision of the program documents."

Counsel has already acknowledged, as your Honor has indicated, as counsel calls it, there's a belt and suspenders. These are hybrid transactions. That's why there are cases that some say for some purposes they're sales, for some purposes they're loans.

Well, the Delaware court has made it even more -- has sliced the onion even thinner, if you will, and it's focused on the difference between, in our case, the applicable analysis would be the difference between direct lender interests and loan servicing agreement interests or rights.

It's clear that the parties acknowledged in their own documents that there could be a scenario under which it would be deemed to be a sale for some purposes and deemed to be a loan for other purposes.

The Delaware case clearly establishes that loan servicing rights for bankruptcy analysis purposes which, as your Honor indicated in the opening remarks, is one of the genesis reasons for a repurchase agreement, that you cannot have a sale of loan servicing rights for that purpose. It has to be deemed a loan.

So even if they sold the DL interests, it didn't sell the loan servicing agreement interests, they pledged them, and then the pledge was taken down as a result of an agreed foreclosure which, of course, any secured lender is capable of doing.

There isn't -- you know, they go through the -- they suggested to your Honor, and your Honor's opening remarks indicated, that there might be this issue because there wasn't a formal auction and there wasn't formal notice. Well, one of the provisions in the UCC is that you can do -- you can simply

take the asset by agreement. You could take in it satisfaction. That's what happened here. There's nothing special or unique about that, it happens every day all over the country with respect to secured lenders.

So we would ask your Honor to rule in favor of -- I'm not sure procedurally -- our motion that would say that, as a matter of law, this agreement doesn't represent a principal agency relationship, and that you deny their motion.

And then I would note that if your Honor were to find otherwise, that we do agree with your Honor's opening remarks, that simply because we might be deemed the principal doesn't mean we're *ipso facto* automatically liable for any acts of Compass.

But I would suggest, your Honor, in closing, loan servicing agreements were not the subject of a sale whether the DL interests were or not.

What is issue here is the loan servicing agreements. There's no allegation that the principal agency relationship arose out of DL interests or how they were voted or what they were done. The issue here is whether or not there was a sale of the loan servicing agreements as a result of this agreement.

And we would submit that, based on the clearest case, based on the severability clause, based upon the fact that the parties themselves acknowledged in the two documents

that counsel has indicated that there would be a possibility of a determination by a court that some or all of this transaction would be characterized as a loan, that your Honor find as a matter of law that it was a loan.

Thank you.

THE COURT: Thank you.

I don't think I need to give you a chance to respond because I'm intent on proceeding with my preliminary feelings. You haven't persuaded me any differently.

I do think under New York law this looks, smells, tastes like a sale, and that's what it ought to be declared to be. And the parties acted. I think that notice is more indicative of a sale as opposed to a UCC sale.

But, again, that doesn't end the issue because, again, even as principal agent, Silar/Asset Resolution are not responsible for Compass's acts outside the scope of the agency relationship.

And even for conduct within the scope, they, of course, will acknowledge payments made, fiduciary moneys held in trust by Compass, they're responsible for all of that, but there is no liability for Compass's right to proceed with a position, or Silar's right to proceed with a position in their favor vis-a-vis withholding or accrual of default interest.

So it doesn't end the inquiry, but I think I am going to proceed with my preliminary ruling, that is, this is

a sale as opposed to a loan.

MR. COLLINS: Absolutely, your Honor.

I'm only approaching the bench -- I'm assuming the podium here now to clarify, I wasn't intending to waive my right to argue for why they're liable --

THE COURT: Sure.

MR. COLLINS: -- for the conduct so --

THE COURT: We'll get to that a little bit later.

MR. COLLINS: Great. Thank you, your Honor.

THE COURT: Okay. And I do appreciate the briefs. The briefs have been very complete, and I do intend to plagiarize extensively in the decision.

I will make sure that any cover order contains this great big long monologue that the Court has because I think the appellate court needs that big long history, and it's here on the record.

But then, on each of the separate orders, I do intend to plagiarize extensively from the briefs. They're very good in this regard.

That's 1702. Let's proceed to 1704. Again, plaintiff direct lenders' motion on regarding plaintiff's liability. This is against the counterclaims of Silar/Asset Resolution.

MR. MILLIMET: And your Honor has already

indicated his initial indication of where he views this matter. So I don't want to waste too much of the Court's time, but I would -- I just want to reiterate a couple of points where I think the motion should be granted.

The motion moved for summary judgment on two grounds: One, that there was an interference as a matter of law pursuant to the 51 percent rule, the LSA right, the right embodied within the preliminary injunction, et cetera.

We also moved for summary judgment that Silar/Asset Resolution could not demonstrate causation for any damages, and both of those grounds I think --

THE COURT: Now, address the first one.

MR. MILLIMET: Yes.

THE COURT: You know, I can conceive of a set of facts which would allow for that cause of action even though there's a 51 percent voting right.

In other words, the allegation here is from Silar/Asset Resolution against Cangelosi, et al., and the Jones Vargas direct lenders, you interfered in a conspiratorial fashion and illegally with our servicing rights.

Your counter is we have the right to take over the servicing rights, the court has declared it thus, upon a vote of 51 percent. So how legally can we be liable for interfering with those rights?

Well, I can imagine a set of facts where Silar/Asset

Resolution first, the clearest case is talking about third parties. You know, third party out of the blue, for example, Cangelosi, not the owner of a note we're talking about, but a third party to one of the notes we're talking about, attempts to interfere with our contract, the LSAs with the direct lenders, and they're doing it in an illegal fashion.

Number one, they're violating the injunction issued by Judge Riegle and/or Judge Jones.

Number two, they're doing it in violation of the confirmation order and sale order.

Number three, they're third parties. They have no standing themselves to vote, and what they're doing is putting together a cabal, you know, they're -- would be their characterization, and to usurp, if you will, the service rights.

That would be the clearest case.

With respect to those, however, who are direct lenders in a particular note, I'm inclined to agree with you, they have the right to vote. They certainly have the right to send out correspondence, to send out letters and attempts to solicit votes, let's get together, let's resolve this note.

They would not have the right to slander or defame. They would not have the right in soliciting -- let's say, for example, that as part of the solicitation to vote, get rid of Compass and obtain a new servicer, that part of the

solicitation says, by the way, ABC, our newly-formed entity will be the servicer, and in that regard we make the following misrepresentations, fraudulent statements regarding Compass.

Why wouldn't they have, properly stated, a cause of action if that's what they stated? You're right, you have the right to communicate, to talk, to arrange for new servicers, but what you don't have the right to do is illegally solicit for servicing rights in you, only one of the direct lenders with an interest, and, more importantly, based upon misrepresentation and fraudulent statements.

MR. MILLIMET: Well, I think part of what we have to understand here is that there are a couple of different factors in play.

The scenario you just presented seems to me would present maybe a situation where some of the other direct lenders may have an issue with the majority of the direct lenders.

I'm not sure that the servicing party would have standing to contest whether or not the majority member misrepresented something -- misrepresented something to another direct lender. That seems to me --

THE COURT: You know, that's true just generally unless that one party is trying to elicit a benefit or interfere with the contract between the -- between Silar and that other direct lender.

For example, you know, we get these cases all the time, interference with contract under Nevada law, and one of the elements is you can't -- you can't state a cause of action if you're alleging interference with a contract to which you are a party.

In other words, if I'm accused of interfering with my own contract with another side, that's not a proper cause of action, there's no cause of action that exists for that.

It can be alleged against me, violation of the duty of good faith in a contract, or breach of contract, but there's no cause of action under Nevada law for interference with my own contract as opposed to the -- but here we have the latter kind of contract.

We have not only a contract with you, you can't be charged with interference with that contract, of course, but you can be charged with interference between -- in the contract between another direct lender and the servicer Compass, Silar. So why doesn't that cause of action follow?

MR. MILLIMET: Well, I have two responses.

One, in the situation here, you've got a contract between another direct lender and the servicer except that that contract is part and parcel with all the other contracts because that one LSA doesn't establish what happens with that loan, you have to deal with the embodiment of all the direct lenders in a loan to get to the 51 percent threshold.

THE COURT: But that really doesn't answer the question.

I agree with you that you've got the right to make misrepresentations without being held liable to a fellow lender to get them to vote the same way you are. Same thing happens in the halls of Congress, you know, I can lie to my fellow senator, and nobody is at fault.

But if you are interfering with that contract by using fraud and misrepresentation, then they've stated a cause of action.

MR. MILLIMET: Except that the alleged interference in your hypothetical assumes that that individual contract stands in and by itself.

And, to me, it seems to me that when you're dealing with fractionalized loans here, and you have multiple LSAs that compromise one loan, the embodiment of the loan constitutes the contract here.

So it goes to your point a moment ago, your Honor, I can't interfere with my own contract. Well, the contracts here are part and parcel of one loan, and it just so happens in the nonordinary sense here, when you're dealing with fractionalized loans, that you have to be able to interact with your individuals because you're -- all the individuals that are subject to that one loan are part of essentially the same contract.

THE COURT: I'm just not fully persuaded, and I'm not quite getting it.

I think you do have to be protected. In fact, there's probably even privilege, some privilege, limited privilege, applicable to communications between co-direct lenders on a note that's held by multiple parties.

There's even probably some privilege that attaches, but I'm not sure it goes so far as to protecting you in an actual attempt to interfere with a side third-party contract.

If what we can say is your intent and the causation and all of the effect had to do simply with the vote, you're right, there's no liability.

But if, on the other hand, a jury would find that your communication, your intent was instead to terminate their servicing rights and get to you some nonextra contractual benefit like, for example, you will be the servicer, you will get all of the default interest and such instead of Compass, seems to me like there you have no privilege and a jury could so find if it had the proper evidence, and therefore they've stated a cause of action.

MR. MILLIMET: Assuming that to be true, I still think that the motion should be granted for the following reasons:

One, the issue that is raised by their response to our motion is that we have a claim for damages here because

interference resulted from a wrongful termination, and even assuming that there were misrepresentations, and even assuming that there was a cause of action back in 2007-2008 for the conduct that was initiated by Ms. Cangelosi --

THE COURT: The Court has said there is no such thing, there is no wrongful termination. 51 percent has the right to --

MR. MILLIMET: And that's my point.

The Court issued that termination order pursuant to the vote of 51 percent that was recognized by the people who had signed up with Bickel & Brewer and, pursuant to that engagement agreement, had authorized pursuant, pursuant to that retention, to terminate the servicer.

And therefore, notwithstanding any potential interference and cause of action that may have existed in 2007, as we sit here in 2009 and 2010, there is no claim for cause -- there is no counterclaim any longer because the vote was not wrongful.

THE COURT: Well, that goes to the heart of the elements of an action for interference with contract.

For example, what we have here is a contract. It doesn't say you are the servicer for five years and have the right to the following fees, it doesn't say that.

I've declared that what it says is you, Silar/Asset Resolution, you are the servicer. But, under Nevada law and

under the LSAs, but primarily under Nevada law, there is a right to terminate this at will as opposed to for cause.

MR. MILLIMET: Correct.

THE COURT: Can you have a cause of action for interference with such a contract?

MR. MILLIMET: And I don't think --

THE COURT: In other words, if a third party who wants to now be the at-will servicer, nefariously and in cabal fashion makes an attempt to interfere with an at-will contract, is there any cause of action for -- or liability for such conduct under Nevada law? I'm not sure there is.

MR. MILLIMET: I don't think there is either, and that was just in furtherance of my point about the retention of Bickel & Brewer.

Those people -- those people signed up with Bickel & Brewer and constituted the 51 percent in the 29 loans pursuant to which the Court granted the termination of the service, and my point there is you found in that order that they could do so without cause, and, as a result of that circumstance, there can't be any kind of -- on the merits, there can't be any kind of claim for interference any longer against the lenders because there is no wrongful termination.

And the response by Silar -- and, by the way, we've established has no standing, the response brief assumes that they have damage because they have lost servicing fees and

they've lost servicing advances potentially because they're no longer the servicer based on a wrongful foreclosure.

THE COURT: Well, it will only be Asset Resolution that's making that argument today.

MR. MILLIMET: And -- well, Asset Resolution has not made the argument.

Pursuant to Local Rule 7.2(d), they did not file a response to our motion which gives this Court consent to grant the motion.

And, also, they never -- by not filing any kind of response, they haven't raised any kind of fact issue. They haven't pursued their claims.

THE COURT: Let me hear a response.

MR. MILLIMET: Thank you, your Honor.

MR. MAJORIE: Mr. Majorie on behalf of Silar.

I'm not sure, given what your Honor has said, whether you want to hear from me or not. I did submit an opposition, and I can answer your Honor's questions.

THE COURT: How about Asset Resolution's response?

MR. MAJORIE: I just wish the trustee had filed an opposition.

THE COURT: You're right, it's the trustee. You're right.

MR. DABBIERI: Good morning, your Honor.

THE COURT: Good morning.

MR. DABBIERI: On behalf of the trustee, to first answer your question whether one can interfere with a contract at-will, I would suggest one can.

And, for example, your Honor, if, to seek revenge against someone, I told his employer that his employee was stealing goods and embezzling moneys and the employee was fired, certainly, that employee would have a contract -- I'm sorry, a cause of action against me for --

THE COURT: For defamation.

MR. DABBIERI: -- for interfering with his employment agreement.

THE COURT: I don't think so.

You would have a cause of action for defamation. You don't have any kind of a Title VII cause of action. It's -- you know, an employer can discriminate on those grounds even if they have wrong facts for the basis of the discrimination, and that person would have a defamation cause of action, but they wouldn't have a right to interference with an at-will employment relationship. I don't think there's a cause of action under Nevada law for that.

MR. DABBIERI: I would suggest there is, your Honor, but we'll move on from that.

With respect to the counterclaims, first, I would submit that Silar actually does have standing to assert these

counterclaims with respect to actions which took place post the assignment, and that would be post Compass's foreclosure, and I believe the damages which are being asserted by the plaintiffs are for causes of action and actions which took place, the damages to Compass -- I'm sorry, the damages to Asset Resolution are -- and what they -- what the direct lenders are claiming were improper acts by Asset Resolution --

THE COURT: I'm not quite sure what you're saying, but are you saying, in other words, the trustee -- they had standing, and the trustee has the right to step into their shoes, and would step into their shoes, and assert -- and assert that they're -- on this summary judgment motion, that it should be denied because there is liability flowing to Asset Resolution?

MR. DABBIERI: I'm saying that in part. I'm saying two things.

The claims by the direct lenders have to be cut in half, so to speak. There are claims for wrongful acts prior to Asset Resolution becoming the servicer.

Now, Asset Resolution took all of those loan servicing agreements and all of those other rights under the assignment which did transfer to it the choses in action, et cetera.

But then there's an allegation by the direct lenders that Silar is also liable for the acts of Asset Resolution

post assignment, and those post assignment rights are held by Silar, and to the extent it's being asserted, well, Silar you're an owner therefore --

THE COURT: Well, what post assignment rights do they have? They have the right -- they have the right, for example, of a shareholder against whom there's been a wrongful conduct alleged that reduced the value of the corporation. They don't have standing to come into court to issue that complaint, right?

MR. DABBIERI: But the direct lenders have said, Silar, you are actually the true servicer during Asset Resolution's time on watch so to speak. Silar, you have a direct liability for what Compass did because you are the true servicer.

Well, those claims were never assigned, and Silar, to the extent that there were wrongful acts by the direct lenders during the time Asset Resolution was the servicer --

THE COURT: I just don't get that. I'm sorry, I don't see that.

The direct lenders aren't claiming that they are the servicer, they're claiming they're third-party liable for their agent's conduct, their servicer's conduct, Asset Resolution's conduct.

MR. DABBIERI: But if -- I'm sorry, your Honor.

THE COURT: So I don't see that that claim is

being made by the direct lenders.

But, more importantly, they transferred any cause of action they have. Like I've said, they have the right to defend themselves, and they can raise this bad conduct in defense against lawsuits against them. But with respect to their affirmative claim against these direct lenders, they've assigned all of that right to you.

MR. DABBIERI: If those acts took place prior to or at the time of the assignment. If an improper act took place by a direct lender after the assignment --

THE COURT: Okay.

MR. DABBIERI: -- future choses in action were not assigned, and it was the existing choses in action that were assigned to Asset Resolution.

THE COURT: Okay. I'll buy that, but there is no choses in action here. They can't complain that your wrongful conduct, direct lenders, against Asset Resolution's servicing rights harmed us, Silar. There's no cause of action for that.

MR. DABBIERI: Well, but if they're being sued for post assignment wrongful acts by Compass --

THE COURT: Who they --

MR. DABBIERI: Silar is.

THE COURT: Yes, they have a right to defend themselves, yes.

MR. DABBIERI: Then Silar should be able to defend --

THE COURT: I agree.

MR. DABBIERI: -- through the Asset Resolution --

THE COURT: I agree.

MR. DABBIERI: -- counterclaims as well.

THE COURT: Addressing now the core issue, Asset Resolution's right to pursue liability against the direct lenders.

The trustee has not filed an answer or response. Should I take that to mean you don't intend to file a response or have a response, or do I take your statement to mean that you are walking into their brief?

MR. DABBIERI: We are walking into their brief. We have asserted in the pretrial order that we have a right of indemnification from Silar, and we are following in their wake, so to speak, as they defend us pursuant to that indemnification --

THE COURT: A brief here was filed on behalf of Silar, but it was filed post appointment of a trustee because Silar had no right to file on behalf of Asset Resolution. Is that a fair statement?

MR. MAJORIE: Yes, it is, your Honor, but I will say the motion was uncertain, unclear. The motion is

addressed to Silar and then talks about Asset Resolution in the body of the motion, and I, of course --

THE COURT: Okay. Let me hear a response on that, please. Why I don't I need to -- I understand that the trustee has not filed a response to the motion, but, number one, there's a little ambiguity about whether the motion is directed to Silar's causes of action or Asset Resolution's or both.

And, more importantly, we have a trustee, the interposition of a trustee who walks into Asset Resolution's rights and ownership, and the only reason there's no responsive brief under the local rule here is because they had no right to file it.

MR. MILLIMET: Who had no right to file it? Asset Resolution --

THE COURT: Silar had no right to file it.

MR. MILLIMET: Absolutely Silar had no right to file it, and the trustee has filed nothing.

THE COURT: And therefore the trustee should be heard orally --

MR. MILLIMET: Orally, maybe.

THE COURT: -- to be able to walk into their brief.

MR. MILLIMET: Well, first of all, that's a new position.

Second of all, Asset Resolution didn't exist before September of '08, and so, as we've established here in my earlier argument, the vote -- the only interference that could have occurred with respect to Asset Resolution by the lenders is the vote by 51 percent to terminate.

And, as we have already established, that vote was more than proper. It had no taint to it. It was people signing up with Bickel & Brewer, and we put that evidence in through summary judgment with this Court, and the Court granted our motion to terminate based on -- that the people -- 1500 people had signed up with Bickel & Brewer to terminate pursuant to their right under the state law.

THE COURT: I'm going to agree with you. It's a little bit gray in my mind, to be honest and frank on the record here, because I can see -- I agree totally that Silar has no claim. Asset Resolution potentially has a claim.

But I think, considering the liability and the way I intend to rule on some of the other motions, it is a little gray, but I think I'm going to agree with the movants here and that -- first, Silar certainly has no right to pursue, but Asset Resolution not only waived it because they didn't file a response, that's not really a fair ground for ruling, but, more importantly, that there just is not a liability here.

MR. MAJORIE: Your Honor, if I could, I guess as a friend of the trustee, point out to the Court a few things

that I think the Court should be aware of before you make your final ruling.

To say that there was no taint here is belied by the record. Your Honor found, and I understand your Honor undid the contempt citation, but you did make findings of fact that would establish --

THE COURT: Did I undo the contempt citation?

Mr. Majorie: Several hearings ago, your Honor. You indicated --

THE COURT: I think it still stands. That's my vague recollection is there is still a finding of contempt.

MR. MILLIMET: There's still a finding of contempt, but the Court opened it up for a jury to reconsider that issue at the trial.

THE COURT: The very merits issue, not just the damages.

MR. MILLIMET: Correct.

THE COURT: Okay.

MR. MAJORIE: And your Honor found that the Cangelosi plan to undermine the servicing started before Compass even started.

Your Honor made fact findings -- these are in our brief. Your Honor made fact findings that she engaged in fraud and misrepresentation.

The trust -- the receiver filed a report with your

Honor which reflected that there was a continuation of fraud and misrepresentation in connection with the receiver vote.

The evidence is undeniable in this record that every single direct lender was contacted with the original Cross proposal that your Honor indicated was not acceptable and was evidence of bad faith.

There is a taint here, and counsel would like to suggest that the votes that resulted from that Cross solicitation are not tainted, but there is no evidence to the contrary.

Our evidence shows that out of their own mouths, across his own affidavit, they solicited every single direct lender. That's what Mr. Duncan's affidavit says. They then were told by the Court they could not participate.

What we now have and the jury could find is that there was a resolicitation, if you will, of -- by Cross for Cross for the Cangelosi group in the guise of soliciting clients for Bickel & Brewer.

And, interestingly, your Honor, we've never seen an actual written vote by any of these 51 percent. Your Honor was faced with an affidavit which your Honor credited as part of the termination that said we have these clients, but the evidence in the record does not reflect any direction by any of those clients, specific authorizations to terminate.

THE COURT: I hear what you're saying.

MR. MAJORIE: Yes, sir.

THE COURT: And it's partly persuasive, but in light -- depending on the ruling down in 1712, the LLC standing, if I agree that they have no standing, you haven't been harmed.

MR. MAJORIE: Oh, no, your Honor, the servicer was definitely harmed. There were disruption of servicing acts throughout this entire period of time, including refusals to accept.

For instance, your Honor even noted, the Gess transaction, part of this process was to induce people to stop -- to stop the servicer from engaging in liquidity events which would have been to the benefit of both -- all of the direct lenders but also the servicer.

THE COURT: Okay.

MR. MAJORIE: And therefore there was real damage.

THE COURT: I think I've got it.

I'm going to grant this motion. And, of course, there will be a lengthy, detailed decision, I'll lay it out for you, but just so it's very clear here, the underlying basis, the real basis, is an overall view of the case and the equities of the case. I just don't think you were harmed.

This Court for two years held the direct lenders off in order to protect the sanctity of the confirmation order and

that sale order, Judge Riegle's statement that you were buying the servicing rights, but that holding off wasn't an ultimate ruling because ultimately I've ruled that they had the right to terminate those servicing rights, 51 percent did.

So, really, what that two years was for, with all due respect, was to give Compass, primarily, and Silar, its financer, the opportunity to act in good faith and persuade these direct lenders who had already been defrauded by USA Commercial that, hey, we are a legitimate servicer, we are looking out for your rights, we have many, many owners of each of these notes, you should trust us because we're the only game in town, and, quite frankly, Compass, at least, I'm not saying anything about Silar, did not do that.

You know, you had -- Silar and Compass had the right to say, hey, we're entitled to the first dollar out. You had the right under the ambiguity of these various agreements. That didn't mean that you should have done it because, obviously, in making claims that we get every last dollar from these notes, direct lenders be damned, and I use that term advisedly, please excuse me, you showed the direct lenders and you showed the Court that you were not pursuing their best interests.

And in spite of the Court's many, many admonitions, I'm protect you, but please acknowledge you are a fiduciary, what you bought was not only servicing rights and fees, you

bought a fiduciary status and standing, and you owe that standing to them.

So while I can't fault you for asserting what you believed were your rights, the real reason, the underlying reason for ruling on this motion is because you didn't take advantage of the two years protection the Court gave you, and you, Compass, you did not persuade them that you were a proper servicer. I gave you that opportunity, but you didn't take advantage of that.

So that's the underlying reason for ruling this way. But I think that the ruling in long, lengthy, detailed fashion will lay out formal reasons for the ruling. I'm going to grant this motion.

1706, *Twombly*. Again, very good brief. I appreciate it. I appreciate the --

MS. CHUBB: Thank you. I have a wonderful associate.

So, your Honor, you said it's too late.

THE COURT: Right.

MS. CHUBB: But how can it be too late when I brought this motion for the first time in February of last year?

THE COURT: We use *Twombly* to get the pleadings in order. If it doesn't state a cause of action, that's the time to do it, at the early pleading stage --

MS. CHUBB: I did it.

THE COURT: -- not two weeks before trial.

MS. CHUBB: I did it.

THE COURT: Because two weeks before trial, we've finished all the discovery, we're ready to go to trial.

Certainly, the movant here can cannot be heard to say we don't understand the complaint because it doesn't allege enough as long as you've heard in discovery that they have enough facts and have alleged enough.

MS. CHUBB: No, I have not heard that in discovery --

THE COURT: Okay.

MS. CHUBB: -- which is why I filed declarations after Mr. Bonnet and Mr. Kehl had been deposed because nothing came out of that discovery --

THE COURT: So, as a summary judgment motion, I think I agree with you.

MS. CHUBB: Well, I --

THE COURT: But, as a motion to dismiss, I think it's too late.

MS. CHUBB: Okay. I brought a summary judgment motion, too, and filed my declarations, and nobody opposed it.

THE COURT: It's alternative. You're right.

MS. CHUBB: Yes, it is. So I think under one of those two, it should be granted.

Because I -- I am now, a week before trial, going to trial and still not knowing what is alleged in facts against my clients which you told them to tell me.

THE COURT: I think I agree with you.

MS. CHUBB: Okay. Thank you.

THE COURT: On summary judgment.

MS. CHUBB: Yes, thank you.

THE COURT: Would you respond to that. You just simply haven't come forward, as is your obligation in summary judgment, to show enough to tie the Vargas --

MS. CHUBB: Jones Vargas.

THE COURT: -- Jones Vargas direct lenders in.

MR. MAJORIE: I would -- I'll address that argument. Our position is that we have.

What we have is evidence that the Jones Vargas direct lenders in 2006 were table-funders for the USA transaction --

THE COURT: But that was totally later, it was totally later. It wasn't part of Cangelosi's initial effort, and, in fact, you've more or less conceded that.

They made very clearly the point we didn't join the LLCs, we didn't participate in the e-mails, the only thing you're accusing us of is post --

MR. MAJORIE: No --

THE COURT: -- bad conduct joining this

conspiracy.

MR. MAJORIE: With all due respect to your Honor, that is not what our evidence shows, and it's not what we've argued.

Our evidence shows --

THE COURT: You'll need to clarify that for me, then, because, in my mind, all you're talking about is joining what the Court or a jury might later find to have been a wrongful civil conspiracy.

MR. MAJORIE: Well, your Honor, we have --

THE COURT: But not at inception and not during the critical time periods when the major damage to Silar was incurred.

MR. MAJORIE: Your Honor, we have two exhibits that show that, in fact, the Jones Vargas lenders were members of the LLCs and participated in the vote, and those are cited in our brief.

We have evidence that the Jones Vargas lenders started in this process with -- in 2006, and had a reason to participate with the Cangelosi group because they had sold interests to other direct lenders immediately prior to the bankruptcy.

We have an interesting collection of Cangelosi group plaintiffs. One of them includes Ms. Cangelosi, obviously, Mr. Stubbs, who is admitted to have been the broker for the

Florida office for the Milanowski group. We have evidence in the record that Mr. Milanowski actually offered to provide cash to those so-called lenders protection group.

And then we have the Jones Vargas e-mail showing that the Jones Vargas clients were, in fact, part of the LLCs and did both vote their interests, and that is part of the evidence that we have which is Exhibit 25, your Honor.

These are e-mails with respect to two different loans. We have one of the Cangelosi group in 2007 showing, quote,

"I just yesterday received the update and I will work on a follow-up. The Kehl family has $1.3 million" --

THE COURT: Let me get a final reply on that issue. That goes to the very core of it. But the critical overriding problem is you don't have standing, you've assigned that to Asset Resolution.

MR. MAJORIE: I agree -- I'm sorry, your Honor, I thought you wanted me in the same spirit that I was --

THE COURT: No, I did.

MR. MAJORIE: Okay. I agree that -- I understand your Honor's rulings, but I was trying to give your Honor the benefit of what I think is important in our opposition --

THE COURT: Okay.

MR. MAJORIE: -- as to why there is a triable issue of fact.

They were participants in 2007, they clearly picked up the mantle directly hiring Bickel & Brewer at the same time everyone else was hiring Bickel & Brewer.

Mr. Collins stood up and represented to the Court that he's here to represent the Jones Vargas direct lenders, but that there were many other direct lenders, I think is the exact quote, will be hiring him.

We have an e-mail that shows that it was all part and parcel of the same plan.

We have Cross showing up both before and after, and then, at the very end, we have a Kehl family member purchasing one of the properties that were the subject of all the fighting with respect to the litigation.

So we have it from 2006 through 2010. We have it in almost every year, we have evidence for almost every year, and we therefore have shown participation by the Kehls sufficient for a jury to infer or find that they were part of this plan from either the outset or from the very beginning through the very end.

Thank you.

THE COURT: Thank you.

Just for the record, the trustee makes the same request to orally step into the brief filed by Silar on behalf

of Asset Resolution?

MR. DABBIERI: Yes, we do, your Honor.

Again, we have tendered the indemnity to Silar. We expect them to defend and prosecute our claims. Thank you.

THE COURT: Thank you.

MS. CHUBB: Yes, the Jones Vargas lenders joined and hired Bickel & Brewer to pursue these claims as individuals, not -- and that was done very intentionally. They were never covered by the LLCs because they didn't join the LLCs.

And to say that the purchase of --

THE COURT: In other words, the LLCs hired Bickel & Brewer, right?

MS. CHUBB: Yes, and then --

THE COURT: But you hired them separately, you jumped on the ship.

MS. CHUBB: I did, because I was concerned that if they weren't plaintiffs, any benefits to this litigation would not be extended to them. So, yes, they became plaintiffs so these same causes of action could be brought.

THE COURT: And how about his response we do have enough evidence to present that they were actually part of a civil conspiracy?

MS. CHUBB: There is no evidence of a civil conspiracy. I've submitted declarations that say we didn't

join any of those. We didn't talk to other direct lenders, we weren't conspiring with anybody, and they deposed them and couldn't find anything to submit here.

THE COURT: I think I agree with you. I'm going to issue that ruling on that summary judgment motion.

MS. CHUBB: Thank you.

THE COURT: 1710. This is Cangelosi's standing argument, summary judgment, that Silar has no standing.

MS. CHUBB: Your Honor, could we have a five-minute break before you start another motion?

THE COURT: Yes, please. Let's take five minutes --

MS. RASMUSSEN: Your Honor, Lisa --

THE COURT: I'm sorry, Ms. Rasmussen?

MS. RASMUSSEN: It's okay. I just wanted you to know that I'm here to argue, but I have no objection to the break.

THE COURT: Let's take five minutes, and let's continue, please.

(A recess was taken.)

THE COURT: Thank you. Let's see, Ms. Rasmussen, this is docket number 1710.

MS. RASMUSSEN: Thank you, your Honor.

I won't belabor the point because you've indicated that you're inclined to grant it, and I don't believe there's

any opposition. In fact, the response that was filed stated that that was essentially Silar's position, either that they did not have standing to pursue a contempt claim against Ms. Cangelosi. So I just wanted to reiterate where I think we are.

The Court decided some few weeks ago that this is an issue that would go to the jury, whether or not there was contempt.

I don't believe that Silar -- and that's what I filed -- Silar has no standing to pursue that. The only person who would have standing is Asset Resolution. And that's my position.

Since I'm standing here, I would like to take the opportunity to correct some of the misstatements that Mr. Majorie made with regard to Ms. Cangelosi.

There has never been any finding by the receiver that Ms. Cangelosi interfered in any way. In fact, I think that, if anything, the receiver would say that she was helpful in gathering votes when they were discussing settlement in 2008.

So, again, we keep repeating this theme that somehow it's a civil conspiracy to seek redress in the courts and to gather and petition as plaintiffs, and, certainly, those -- that would be a violation of the First Amendment to listen to Mr. Majorie tell it, and I just wanted to say that for the

record because it's kind of hard to sit here and listen to the pounding and the constant battering of Ms. Cangelosi.

THE COURT: Thank you.

MS. RASMUSSEN: Thank you, your Honor. I'll just stay here.

THE COURT: Okay.

MR. MAJORIE: Your Honor, with respect to the receiver's report, I will just ask the Court to look at our papers. The receiver said that the vote was the result of, in his opinion, gross, false and misleading statements.

I'll move on.

With respect to this motion, we do have -- you know, we do have the same standing position as we had before, and I don't want to belabor the record.

Our view is that we were a party. To the extent we've lost standing, we've lost standing, and there is not a whole lot I can do about it until the Ninth Circuit maybe gives me my two percent.

THE COURT: Okay. Very good. Thank you.

I'm going to grant this motion then.

MS. RASMUSSEN: Thank you.

THE COURT: And I'll prepare the order.

Thank you, Ms. Rasmussen.

Finally, we have 713, that, again, is Silar's motion. If, in fact, there was election available under

taking principal or applying payments to principal first rather than interest, no such election was made. Silar's motion.

MR. MAJORIE: Your Honor, with respect to the election motion, your Honor's preliminary indication is the way we would ask your Honor to rule, that is, there was -- there was a requirement in the note type for transactions for an election, otherwise there would be a default, if you will, to principal -- I'm sorry, to interest.

Your Honor has indicated that there would be an argument that there was -- since there were no elections, there could be an assertion of good faith, at least in terms of the right to assert on behalf of Compass, and therefore, since there is no proof of any those elections, we would ask that this summary judgment motion be granted.

I'm not sure how it impacts ultimately in terms of the issues to be tried, but I do think it would be useful to establish as a matter of law, either through an instruction to the jury, if we get there, or what have you, by virtue of granting this motion that there were no such elections made, none were communicated, none were made, and that would be our request so that you grant this motion.

THE COURT: Thank you. Please.

MR. COLLINS: Very simply, your Honor, we disagree with their construction of the promissory note.

But as far as the election, there's no deadline in the promissory note for when we can make the election.

As we know, most of these loans didn't pay much of anything. So you wouldn't make an election if you didn't have a payment to be received.

And we believe the evidence will show at trial that people would elect, when necessary, to take it all as principal for tax reasons, for practical reasons, nothing against Silar or the servicer, but they would rather put more money in their pocket than put money in the servicer's pocket. So therefore they would elect to principal at the appropriate time that it's needed to do so.

But the motion is really based on a false premise that there was some obligation to make an election at some point in the time in the past. Well, there's nothing in the promissory note that says that.

And, we believe, your Honor --

THE COURT: So, in other words, you kind of concede and agree that when and if a payment is received, that's a deadline for making an election. It has to be applied somewhere within a reasonable time period after that payment has been received.

But to the extent the payment hasn't been received, there's a continuing, ongoing right to make that election whenever a large payment or small payment comes in.

MR. COLLINS: Right, your Honor.

My understanding, in the past -- and we would put on evidence at trial to the extent necessary, that, in the past, when money did come in the door, it was elected as principal because that's the rational thing to do.

Now, your Honor, I do want to, in full disclosure to everyone is, you had made a prior ruling in the summary judgment order --

THE COURT: Please.

MR. COLLINS: -- on September 18, 2009, and that's why we asked to take a little break because I believe there's a little bit of ambiguity there.

If I may, your Honor, the problem is it splits on two different pages.

If we go to the last full paragraph on page 7,

> "The majority of the promissory notes provide that payments the loan servicer collects from the borrowers are to be applied at the option of the direct lenders first to accrued interest."

"At the option first to accrued interest."

And then, your Honor, the Court stated,

> "Note Type 1 is distinct in its wording and provision for payment to the principal first unless the lender chooses to apply to it the accrued interest."

We believe that is a correct interpretation of the

promissory note. So that if there's no election, it's principal. And you were talking about promissory note 1, which is like most of the loans, it's 30 some of the 50 some loans.

Your Honor, but -- you did go on to state in your conclusion paragraph to that section,

> "The court holds that as a matter of interpretation of the contract, Note Type 1," that I just mentioned, "provides that payments go to accrued interest then payable unless direct lender chooses to allocate it elsewhere at its discretion."

And I think those two paragraphs conflict, your Honor, or I may be misreading it, and that's why we asked to take the break. I never noticed it before. We always assumed you had ruled against us on that.

THE COURT: Well, I think I have. I think that last sentence kind of says it, and, really, it's -- as opposed to your implied election, I have a little difficulty putting an *imprimatur* on that one.

But I certainly think I am inclined to agree that you still have a continuing right to make an election until a reasonable time period after payment or principal payment is received.

MR. COLLINS: Thank you, your Honor.

THE COURT: Okay.

MR. MAJORIE: Your Honor, with respect to that, I certainly respect your Honor's practice of indicating where you're going, and I don't want to argue with the Court, but with all due respect to the Court, we have -- that is an issue that's not really necessary -- the second part, which is, in the future, if a payment comes in, and I can think of several arguments against it, against that interpretation, and it's --

THE COURT: You're just not arguing that right now.

MR. MAJORIE: And it's not before your Honor, and I would just ask that you limit your Honor's ruling to my motion as it relates to the fact that as of the trial date this were no elections.

I would point out that to the extent that Mr. Collins has said -- and I think I heard him correctly -- that he plans on bringing some people in who will testify that they -- I think he said would or did make elections, the time for us to know who those people were was in his opposition to summary judgment through affidavit or otherwise.

I mean, there are so many of them, and it is really unfair for us to fly blindly, if we are going to trial, as to who he thinks he's going to show made these kind of super secret elections, because I have not seen any evidence of any.

THE COURT: Okay. I'll take under consideration your request.

I'll issue orders on all of these.

I think you've pretty well heard, either preliminarily or during the course of the argument, how I'm going to rule, and I'll get those out as soon as I can.

This actually resolves most of the lawsuit. There is a big, huge gap here about damage flowing one way or the other.

Of course, we've eliminated standing for Silar. Asset Resolution has asked to be heard on those damage claims through the trustee adopting Silar's pleading and response. I have to make a decision on that, but, otherwise, Silar is out of most of those claims.

And on some of the liabilities going the other direction, I've ruled as well. So much of the lawsuit is now -- will now be finished.

There are some very narrow issues of damage still that are possible will be presented to the jury.

I've also given you a prediction about how I think the case ought to come out, you know, sitting as a juror.

So let's talk about the trial.

I think my intent right now is to take the trial off calendar and to mandate that you sit down with the mediator and try to resolve this final area within the parameters specified by the Court, and, of course, subject to the potential that the Court -- that I am wrong, that these

rulings would be reversed on appeal. There's always that risk factor as well.

But I think what I ought to do now is to force you, mandate that you sit down now for a final mediation and then schedule what could be a much, much more shortened trial.

MR. MAJORIE: We absolutely -- this is Mr. Majorie on behalf of Silar. We would agree with the Court that's the appropriate thing to do. As I indicated, we're all scheduled to meet tomorrow.

And I would note for the Court that when I first made the comment about needing the Court's assistance because of another trial, I now have been -- I had another matter come up with Wyoming District Court, and I have a setting in late June. I think I'll tell -- I will inform the Court that this has been put off, and I may get to move that.

I don't know if the Court -- the Court indicated that he had called --

THE COURT: I don't know what you meant.

MR. MAJORIE: I'm sorry, the Wyoming District Court had indicated that -- it inquired about the Asset Resolution case, and I had just wanted the Court -- this Court to know that if you had communications, or if personnel did, I will make sure that I communicate to the Wyoming District Court now that you've put us off so that he can set his calendar because he had -- it had been affected by today.

MR. COLLINS: Your Honor, we will certainly proceed with the mediation tomorrow in good faith. You know, a consensual resolution makes sense in this case if we can get there.

We understand the Court's suggestion about possibly moving the May 24th date. I would have to check with my clients to actually agree to that, but I can't say it doesn't make sense.

We would ask the Court, though, that if we can't get there, and we will try our hardest tomorrow, and we've had preliminary discussions. After the last hearing, there was a half day discussion --

THE COURT: Maybe the way to handle that is later in this week set a pretrial status because, number one, you know, right now the pretrial order is just in no condition to help us for the trial.

And so even if your mediation is unsuccessful, I think we can come to some very drastic reduced parameters for that pretrial order, and then, of course, you're going to need some final preparation time if we are going to trial under that reduced pretrial order.

MR. COLLINS: Your Honor --

THE COURT: So why don't I give you a status hearing and entertain any further suggestions you have regarding dates for trial. Why don't I give you a further

trial status hearing later this week.

MR. COLLINS: Can we do that by telephone, your Honor? It would be --

THE COURT: Yes, we can.

MR. COLLINS: Okay. And, your Honor, I did want to get a clarification.

With respect to -- you found that it was a sale to Silar, and you said we could argue later on about what claims could Silar be liable for.

We would --

THE COURT: Silar still has defenses: Number one, we are responsible for any decisions or actions that Compass made in the scope of their agency's employment with us, but we're not liable for wrongful conduct outside the scope;

And -- and, number two, we probably, on the merits -- we didn't address that here today, but probably on the merits, even -- there is no liability either by Compass or by us for simply asserting what we thought to be our rights.

MR. COLLINS: Absolutely, your Honor.

With respect to what they can be liable for as far as being within the scope of the agency or the relationship, we may want to present a short document to you where we summarize what our claims are and why we believe they fall within something that Silar is liable for. I don't know if

you'd want that for the Thursday hearing.

THE COURT: I don't particularly want that. You'll want that in discussions with Silar in framing the pretrial order.

MR. COLLINS: Okay.

THE COURT: But let's do that. When shall we hold this, Thursday or Friday?

MR. MAJORIE: Your Honor, I would ask -- Mr. Majorie.

I would ask for Friday just because we don't know whether we go beyond tomorrow, and with our travel schedule, I'm praying we'd be back by Friday in order to at least have a phone call.

MR. COLLINS: Friday would be fine, your Honor, with us.

THE COURT: Let's see. What's today, the 19th? I'm traveling --

THE CLERK: You're traveling on Friday. I suggest Thursday at 2:30 p.m.

THE COURT: Let's do that, Thursday the 2:30. I'm sorry, I am traveling on the 23rd.

MR. COLLINS: And we will try our best.

THE COURT: You can appear by phone and/or in person, please, with prior approval by Madam Clerk.

MR. HAYWARD: Your Honor, Dan Hayward for the

Compass defendants. Just a housecleaning question.

What would be the status of the further pretrial submissions, if you will, such as proposed jury instructions, statement of the case, voir dire?

THE COURT: You're not obligated to do that by this Thursday.

MR. HAYWARD: I'm sorry?

THE COURT: We'll give you a deadline this Thursday to do that. You're relieved of that right now.

MR. HAYWARD: Oh, you're going to set it on Thursday, it's not the deadline is Thursday.

THE COURT: Right.

MR. HAYWARD: I understand. Thank you.

MS. CHUBB: That's fine, and I just wanted to remind you that there are a couple of orders that we've submitted, one on the motion to disburse the moneys, and --

THE COURT: Some of those I've signed, and I'll make sure I clear out the rest of that inbox.

MS. CHUBB: Great. Thank you.

MR. DABBIERI: While we are -- Jonathan Dabbieri on behalf of the trustee, your Honor.

While we are covering orders that are pending, we uploaded this morning an order on the University Estates motion, and we would just ask if your Honor could give that prompt attention.

THE COURT: I will do that today.

MR. DABBIERI: We have a buyer ready to buy.

THE COURT: Okay.

MR. DABBIERI: Thank you, your Honor.

MR. HAYWARD: I'm sorry, your Honor. Dan Hayward on behalf of Compass again.

Just for our information, we did file a motion to set aside the default against the Compass LLC entities, and also what I believe --

THE COURT: When did you file that?

MR. HAYWARD: I believe it was Thursday of last week, if I'm not mistaken, and we just filed it in the ordinary course.

THE COURT: Now, this would really be a reconsideration because I previously denied the motion.

MR. HAYWARD: Well, with respect to the actual Compass entities, Mr. Rawlins, who is counsel in this -- let me -- very quickly.

There was the motion to enter the default. Mr. Piskun appeared on January 5th of this year before your Honor --

THE COURT: I'm sorry, what's your question, when to set it or --

MR. HAYWARD: No, no, no. My question is -- I'd really set that in the ordinary course. I don't believe an

opposition is, of course, due yet.

THE COURT: Okay.

MR. HAYWARD: It won't be for sometime. I just wanted to bring it to your Honor's attention.

In light of the possible continuance of the trial, should I leave that as is, or would the Court like for me to move for a --

THE COURT: Your question is whether to expedite it?

MR. HAYWARD: Yes.

THE COURT: Why don't you reserve that till Thursday. If we set the trial in the following week, you'll want to expedite it.

MR. HAYWARD: Absolutely, thank you, your Honor.

THE COURT: But otherwise --

MR. HAYWARD: And I didn't want to inconvenience everybody by filing something like that yesterday or, I'm sorry, Friday with all this going on today. So that's my explanation for that.

THE COURT: Thank you, and thank you so much for your patience. I did feel a strong need to make a very complete record here. We have lots of parties and a lot of dollar amounts involved, as well as we do want to recognize the good offices of Judge Hagen. If there's anybody that can resolve this, he can, short of a trial. So I do hope all

sides will appear in good faith.

But I did want to make a very lengthy record, not just for his benefit, but for the benefit of the appellate court in obvious forthcoming appeals.

Okay. Thank you very much. Court will be in recess.

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I certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

/s/Margaret E. Griener 05/19/2010
Margaret E. Griener, CCR #3, RDR
Official Reporter